ARBITRATION OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN

PHELPS DODGE Morenci, Inc.

AND

Joe T. Lauterio
Journeyman Mechanic
Discharge

Hearing Held: May 7, 2002

C. Chester Brisco, Arbitrator

APPEARANCES

FOR THE EMPLOYER: Dick Kaslic and John Shock
FOR THE EMPLOYEE: David Williams

BACKGROUND

The Grievant, Joe T. Lauterio, was hired by the Company on April 30, 1996, as a Heavy Duty Equipment Mechanic in the Mine Division. After five and one-half years of successful performance in his job, which he liked, he was suspended pending further investigation on November 20, 2001, for admitted misconduct. He was terminated on November 27, 2001, and immediately appealed to the Company's Problem Solving Procedure. His admission, according to the Company's Step Two Problem Solving Response, was that he admitted "to borrowing a lighter from another employee and igniting a wadded up newspaper while traveling on the bus at the end of shift." It is disputed as to whether or not the paper was still in flame at the time it was thrown. The Company concluded that Mr. Lauterio's behavior "could have resulted in a serious incident and injury to yourself or others. You put yourself and all of your coworkers' safety in jeopardy." [Joint Exhibit 7] Mr. Lauterio's appeal was unsuccessful and this arbitration resulted.

ISSUES

The parties stipulated to the following statement of the issues:

1. Did the Company have just cause to discharge Joe Lauterio?
2. If the answer is no, what is the remedy?

POSITIONS OF THE PARTIES

Position of the Company

The Company argues that Mr. Lauterio engaged in unsafe behavior that cannot be tolerated because "there is not a safety system in the world that can protect an employee if they choose to avoid the very system designed to protect them." [Company Brief 3] Based upon the Company's investigation, he endangered the lives of a bus full of employees who work around fuels, oils, and inflammables. Safety is an individual responsibility, as the Arbitrator stated in the Laurene Williams case. Mr. Lauterio at first refused to admit his conduct and "to this day, Mr. Lauterio has not acknowledged that it was an unsafe act." The discharge should be sustained.

Position of the Grievant:

Mr. Lauterio admits that he lit a newspaper while on the bus. It was at the urging of his co-workers and he extinguished the flame before throwing the balled up paper. The Company failed to introduce any evidence to the contrary and it chose not to have any of the authors of the three statements testify. The reason is that "the Company is trying to exaggerate this incident to help justify their decision to discharge Lauterio." [Employee Brief 3] In mitigation, it must be observed that the Company did not point to any specific safety rule that was violated; horseplay was rampant on the bus at the time of the incident; Mr. Lauterio has a five and one-half year discipline-free record as a good employee and he is a hard worker. The discipline of discharge is too severe for the offense, concludes the Employee.

FACTS

The Grievant worked 12-hour 7 a.m. to 7 p.m. shifts in the Heavy Duty Truck Shop (HDTS) as a Heavy Equipment Mechanic. He and the other employees assigned to the HDTS are transported to and from the mine entrance in a company bus. The ride takes approximately 20 minutes. At the end of shift on November 5, 2001, they were returning to the mine entrance and during the ride considerable horse play took place with employees throwing food, hard candy, and balled up newspapers.

Next day, an employee who had been on the bus (whose identity is not revealed in the record), reported to Supervisor Sam Angle that "he had been hit with a smoldering rag on the bus going out the day before." [TR 76] Because of the reported horseplay, Supervisor Angle decided to conduct an investigation. He interviewed all 27 employees who were on the bus. The

employees were reluctant to say what had happened, but during the investigation three written statements were obtained. They are as follows:

> Statement of Jim Taylor
>
> On Nov. 5 at approx. 7:25 PM while on the bus going from HDTS to change room a balled up cleaning towel which was smoldering was thrown from the rear of the bus and slid across my left leg then proceeded further up the center aisle about 2-3 feet at which time another employee stepped on the towel and extinguished the fire (embers).
>
> As I was fasceing [sic] forward and engaged in conversation with Mr. Nicklas I did not see who threw towel.
>
> [Dated November 6, 2001]
> [Company Exhibit 1]
>
> Statement of David Wood
>
> On Monday, Nov. 5, 2001, on or about 7:15 PM on the bus ride out from HDTS to the mine gate, a piece of paper was lit on fire and tossed down the center of the aisle on the 101M bus by Joe Lauterio. A lighter was passed back from 2 seats or 1 seat ahead of him. There was lots of notice in the back of the bus.
>
> [Dated November 20, 2001]
> Company Exhibit 2]
>
> Statement of Jim Dunn
>
> Sitting with Joe, Dave and Tom started to throw paper; Joe lit paper & throw it to front of bus.
>
> [Dated November 22, 201]
> [Company Exhibit 3]

These statements were admitted into evidence over the objection of the Grievant, but with the arbitrator's caveat that the statements were hearsay, and that the arbitrator could not accord them the weight that he would give to testimony from a percipient witness. None of the authors of these statements was called to testify and there is no evidence in the record that they were unavailable. Failure to call the authors as witnesses effectively defeated the Grievant's opportunity to cross examine so that their perceptions of the events could be further explained.

Mr. Lauterio was asked to describe the incident. His testimony was forthright and it was credible:

Q Could you please tell us what happened on the bus that day?

A I sat down and we were leaving and we found out that Tom Wood and Ticer were going to get laid off. So they brought a lot of newspaper and they wadded it and started throwing it at everybody. And then candy and other stuff were flying around. A lot of screaming, yelling. Then I got hit with a piece of newspaper. And then I grabbed it and wadded it, was going throw it, but then somebody yelled, "Light it." And I told them I didn't smoke or have a lighter. So then the guy in front of me, he handed me a lighter and then that's when I did the stupid thing is I grabbed it and I lit the corner and I

burned about that much of the paper. [The witness indicated about two inches with his fingers.] As soon as I lit it, I realized it was wrong. And I grabbed it and I rolled it up like that [indicating a ball with his hands] and rolled it on my pant leg and then stuff was still flying, so I took it and threw it and it went about, oh, the second row to the front, somewhere right in the middle aisle. And then another mechanic opened the window and it was raining so we all slid down in our seats. And then stuff was still flying and screaming and then we got to the change room. [TR 19-20]

The parties agree that the balled newspaper was thrown a distance of about 20 feet. Mr. Lauterio was certain that the paper was not smoldering when it left his hand. [TR26] Fellow employees variously describe Mr. Lauterio as having "a piece of paper [that] was lit on fire and tossed," (Wood), or he "lit paper and throw it" (Dunn). Mr. Taylor testified that he saw a "balled up cleaning towel which was smoldering [that] was thrown from the rear of the bus," but he did not see who threw it. Supervisor Angle testified that the unsafe act was that "he lit a paper – newspaper or something on a – on a bus." [TR 11]

The arbitrator observes that a flaming piece of paper could not be tossed 20 feet because newspaper, to travel that distance, would have to be balled up so that it comprises the necessary density. An open newspaper cannot be tossed; balled up newspaper refuses to burn unless it is submitted to a flame for a period longer than, say, to light a cigarette. Anyone who has attempted to light a fire by setting a match to balled up newspaper has suffered the frustration of learning that it will not sustain a flame from simple application of a lighter. Based upon the facts introduced into the record, the conclusion is that Mr. Lauterio lit the open edge of a wadded newspaper, extinguished the flame, balled it, and then threw it. The laws of physics, personal experience, and the hearsay statements of Wood and Dunn are consistent with this conclusion. Taylor's statement is either in error as to what he saw or there was another employee on the bus who threw a flaming towel; in either case, it is not probative of Mr. Lauterio's alleged misconduct.

OPINION

In arbitration of disciplinary cases the Company must establish just cause for its action, that is, that its decision was reasonable: an exercise of discretion that was neither arbitrary, capricious nor discriminatory. The Company must establish this ultimate fact by the weight of the evidence submitted at the arbitration hearing. Mr. Lauterio's participation in the melee that occurred on the bus would have been better understood had the hearsay statements of Taylor, Wood, and Dunn been supported by their testimony as witnesses where they could have given a

more complete picture of the circumstances and been subject to cross examination. There is no evidence that these witnesses were unavailable to testify, and their absence suggests the decision was made that their testimony would not have been helpful to the Company's case.

The issue, therefore, is whether the proven misconduct of Mr. Lauterio is sufficiently egregious to justify termination without the application of the Company's Counseling Policy (1st written counseling; 2nd written counseling; leave with or without pay; discharge). The Policy specifies that a "Serious violation of a safety rule . . . may result in immediate discharge."

The context in which Mr. Lauterio's misconduct occurred was one of a general melee in the bus during which objects of various kinds were launched by a number of employees whose identities were not revealed to the arbitrator. It is reasonable to conclude that these objects could have distracted the bus driver who was responsible for the safety of all on board the bus. These acts were clearly safety violations that the Company regards as unworthy of discipline. It is true that Mr. Lauterio escalated the situation by lighting a newspaper for a moment of sufficient length for it to burn about two inches at the edge. After extinguishing the flame, he then engaged in conduct similar to many others on the bus: he threw a balled up newspaper. In this context, his misconduct, safety violation though it was, is more akin to smoking in an unauthorized area (which the bus certainly is) than it is to conduct described by Superintendent Williams in his testimony: "He had to wad a ball of paper up, holding it up in the air, light the paper, and then throw it into a group of people . . . " This testimony suggests that Superintendent Williams concluded from what was told to him that Lauterio threw a flaming newspaper into a group of employees. This conclusion is not supported by the weight of the evidence.

While Mr. Lauterio was at first reluctant to admit what he did on the bus, so were all the other employees. His testimony at the arbitration hearing convinces the arbitrator that he knows what he did was wrong. He testified that "I realized it was wrong," and "I realize I done something very stupid here." [TR 23] These words do not support the Company's contention that Mr. Lauterio has refused to recognize that he engaged in a safety violation or the contention that he is the type of employee who cannot be trusted in the future to be concerned with safety. As the Company pointed out, quoting from a prior decision of the arbitrator, "safety is an individual responsibility." The Williams decision supports the conclusion in this case because her discharge was sustained only after she committed several safety violations and had retraining in an effort to correct her behavior. These efforts failed and, finally, she walked under a suspended load that

fell and caused her severe injury. Progressive discipline was applied prior to discharge. Mr. Lauterio did not receive this consideration.

The testimony of Mr. Lauterio and his demeanor as a witness convince the arbitrator that he has accepted responsibility for his misconduct, he has recognized his error, and that it is not likely to be repeated. This conclusion is buttressed by his discipline-free record and the recognition by his supervisors that he is a hard worker and a good employee.

For the reasons given above, the arbitrator finds that the penalty of discharge is too severe for the proven misconduct, that it is arbitrary because the penalty does not match the severity of the misconduct, and that it is capricious because similar misconduct, although perhaps of a lesser degree, by employees on the bus received no disciplinary attention. A lesser penalty of a three-days suspension without pay is appropriate.

AWARD

1. The Company did not have just cause to discharge Joe Lauterio
2. The remedy shall be that Joe Lauterio shall be suspended for three working days without pay, that he shall be restored to his position of Heavy Equipment Mechanic forthwith, and that he shall receive back pay and benefits for all time lost except for the three-day suspension. The arbitrator retains jurisdiction solely for the purpose of administering the terms of this Award.

June 14, 2002

Tustin, California

_____

C. Chester Brisco, Arbitrator